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## Constitutional Law--Legislator's Privilege from Arrest

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CONSTITUTIONAL LAW — LEGISLATOR'S PRIVILEGE FROM ARREST.

— Summons was served on Senator Huey P. Long in an action for libel. He moved to quash the summons and the service thereof, claiming a violation of his constitutional privilege in that members of Congress, "shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech on debate in either house, they shall not be questioned in any other place."<sup>1</sup> *Held*, service of civil process is not an arrest under this provision. *Long v. Ansell*.<sup>2</sup>

The present interpretation clearly reaches a proper result. Our type of government does not favor privileged classes and provides this exception only to preserve the freedom of the national legislature. Arrest as a means of starting a civil action is more rare today than when this provision was framed.<sup>3</sup> There is little inconvenience to a Senator and no loss to his state<sup>4</sup> when he is served with a summons in a civil action while attending the Senate. The session will probably adjourn before the case is tried<sup>5</sup> and, if not, he can usually secure a leave of absence to make his defense or leave the case entirely in an attorney's hands. Many times he will not even need to appear. If his public and private duties conflict too greatly, that is a ground for continuance, although it is a matter of the court's discretion rather than as a right.<sup>6</sup> Thus, a contrary rule would do little more than serve as an aid to defraud creditors.

It is interesting to notice that the last part of the privilege

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<sup>1</sup> U. S. CONST., art. I, § 6.

<sup>2</sup> 55 S. Ct. 21 (1934); commented upon at an earlier stage in (1934) 34 COL. L. REV. 1131. See generally BOWERS, CIVIL PROCESS AND ITS SERVICE (1927) 563-69; 3 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1907) 1110-16; Field, *The Constitutional Privilege of Legislators* (1925) 9 MINN. L. REV. 442-57.

<sup>3</sup> Finley, *Arrest of Defendant in Civil Action* (1932) 20 Ky. L. J. 478-80.

<sup>4</sup> To arrest a Senator is to deprive a state of half its voice in the Senate. Yet Huey Long voluntarily absented himself from that body for two years. And the people of West Virginia have just elected a Senator under the constitutional age limit who will not take his seat during five months of the present session.

<sup>5</sup> This is even more likely to be true in state legislatures which usually meet at longer intervals and for shorter sessions. Even Congress is only in session about half the year.

<sup>6</sup> *Nones v. Edsall*, 18 Fed. Cas. 296 (1848); see *Coxe v. M'Clenachan*, 3 Dall. 478, 479, 1 L. Ed. 687 (1798); *Johnson v. Offutt*, 14 Metc. (Ky.) 19, 21 (1862). But see *Geyer's Lessee v. Irwin*, 4 Dall. 107, 1 L. Ed. 762 (1790).

is always liberally construed,<sup>7</sup> whereas the first part is usually interpreted so narrowly as nearly to abolish it. For example, in the phrase "treason, felony, and breach of the peace" the expression "breach of the peace" is deemed to exclude all crimes from the privilege, although that interpretation clearly makes the words treason and felony superfluous.<sup>8</sup> The member is not protected from a subpoena, although it is doubtful if he can be arrested and forced to attend trial.<sup>9</sup> The privilege is stated to extend "in going to and returning from the same" but this means only a reasonable time.<sup>10</sup> The provision never operates against the legislature;<sup>11</sup> and not against the courts unless it is properly and promptly claimed, for this is a personal privilege and is considered waived unless claimed.<sup>12</sup> It does not protect the member if he is the plaintiff.<sup>13</sup> Indeed, it is restricted so narrowly that now, when civil process may be served, the exemption confers little more than a privilege from actual arrest in a civil suit. It was not always so. Several early cases refused to allow the service of civil process.<sup>14</sup> Some, however, involve only dicta on this point, and others are based on a mistaken idea of Blackstone.<sup>15</sup> Thus, the better view

<sup>7</sup> *Cochran v. Couzens*, 59 App. D. C. 374, 42 F. (2d) 783 (1930); *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377 (1880); *Coffin v. Coffin*, 4 Mass. 1, 3 Am. Dec. 189 (1808).

<sup>8</sup> *Williamson v. United States*, 207 U. S. 425, 28 S. Ct. 163, 52 L. Ed. 278 (1907); *United States v. Wise*, 28 Fed. Cas. 742 (1842); *State v. Smalls*, 11 S. C. 262 (1878); see *Burton v. United States*, 196 U. S. 283, 295, 25 S. Ct. 243 (1905); 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed. 1891) § 865. *Contra*: *State ex rel. Insengring v. Polacheck*, 101 Wis. 427, 77 N. W. 708 (1898).

<sup>9</sup> *United States v. Cooper*, 4 Dall. 341, 1 L. Ed. 859 (1800); *United States v. Thomas*, 28 Fed. Cas. 79 (1847); *Respublica v. Duane*, 4 Yeates 347 (Pa. 1807); *In re Potter*, 55 Barb. 625 (N. Y. 1864) (New York legislature decided an attachment was a breach of their privilege).

<sup>10</sup> *Hoppin v. Jenckes*, 8 R. I. 453, 5 Am. Rep. 597 (1867); *Corey v. Russell*, 4 Wend. 204 (N. Y. 1830); *Lewis v. Elmendorf*, 2 Johns 222 (N. Y. 1801); *Colvin v. Morgan*, 1 Johns 415 (N. Y. 1800).

<sup>11</sup> *People ex rel. Hastings v. Hofstadter*, 258 N. Y. 425, 180 N. E. 106 (1932).

<sup>12</sup> *Geyer's Lessee v. Irwin*, *supra* n. 6; *Prentiss v. The Commonwealth*, 5 Rand. 697, 16 Am. Dec. 782 (Va. 1827); *Johnson's Ex'rs v. Johnson*, 4 Call. 38 (Va. 1785); *Chase v. Fish*, 16 Me. 132 (1839). *Contra*: *Cook v. Senior*, 3 Kan. App. 278, 45 Pac. 126 (1896).

<sup>13</sup> *Botts v. Tabb*, 10 Leigh 616 (Va. 1840).

<sup>14</sup> *Bolton v. Martin*, 1 Dall. 296, 1 L. Ed. 144 (1788); *Miner v. Markham*, 28 Fed. 387 (E. D. Wis. 1886); *Cook v. Senior*, *supra* n. 12; *Anderson v. Rountree*, 1 Pin. 115 (Wis. 1841); *Doty v. Strong*, 1 Pin. 84 (Wis. 1840); *Tillinghast v. Carr*, 4 McCord 152 (S. C. 1827); *King v. Coit*, 4 Day 129 (Conn. 1810); see *Geyer's Lessee v. Irwin*, *supra* n. 6; *Nones v. Edsall*, *supra* n. 6.

<sup>15</sup> In *Merrick v. Gidding*, *MacArthur & M.*, 55 (D. C. 1879), it is pointed out that *Bolton v. Martin*, *supra* n. 14, relied on a passage in an old edition of Blackstone which had been changed 18 years before. *Miner v. Markham*, *supra* n. 14, also quotes this passage in its original form.

seems to support the principal case.<sup>16</sup>

Some states, including West Virginia, have enlarged the privilege by statute. An early Virginia law privileged the members "from all arrests, attachments, executions and all other process whatsoever". By this law it was possible to issue civil process, but it could not be served until the end of the privilege.<sup>17</sup> West Virginia, with a constitutional privilege similar to that in the federal constitution,<sup>18</sup> has a statute which allows the service of civil process but declares that, "no trial shall be had or judgment rendered in any such suit, nor shall any execution or attachment be levied upon the property of such member during the sessions of the legislature or for ten days immediately before or immediately after session."<sup>19</sup> If any such action is taken it will be held invalid and set aside.<sup>20</sup> If we accept the interpretation of the principal case it would seem that the statute is broader than the constitutional base on which it rests. Yet a similar provision has been declared valid.<sup>21</sup>

—RALPH M. WHITE.

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GUARANTY — PROMISE OF BANKER "TO INSURE" DEPOSIT — STATUTE OF FRAUDS. — Plaintiff went to the Bank of F, fearing it was insolvent, and intending to withdraw her deposit. Defendant, a director, stockholder, and depositor in the Bank of F, who was a man of means, known to plaintiff a long time, said to plaintiff, "I will insure your money. It is safe here." The bank subsequently failed, and plaintiff sued defendant on his promise. *Held*, defendant's promise was original, upon sufficient consideration,

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<sup>16</sup> *Howard v. Citizens Bank and Trust Co.*, 12 App. D. C. 222 (1898); *Merrick v. Giddings*, *supra* n. 15; *Kimberly v. Butler*, 14 Fed. Cas. 499 (1869); *Dovle-Kidd Dry Goods Co. v. Munn.*, 151 Ark. 629, 238 S. W. 40 (1922); *Phillips v. Browne*, 270 Ill. 450, 110 N. E. 601 (1915); *Berlet v. Weary*, 67 Neb. 75, 93 N. W. 238 (1903); *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792, 45 L. R. A. 563 (1898); *Bartlett v. Blair*, 68 N. H. 232, 38 Atl. 1004 (1894); *Rhodes v. Walsh*, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632 (1893); *Gentry v. Griffiths*, 27 Tex. 461 (1864); *Johnson v. Offutt*, *supra* n. 6; *Catlett v. Morton*, 4 Litt. 122 (Ky. 1823); see *Wilder v. Welsh*, 1 MacArthur 566 (D. C. 1874).

<sup>17</sup> *McPherson v. Nesmith*, 3 Gratt. 237 (Va. 1846).

<sup>18</sup> W. VA. CONST., art. VI, § 17.

<sup>19</sup> W. VA. REV. CODE (1931) c. 4, art. 1, § 3.

<sup>20</sup> *Pittinger and Pugh, Ex'rs v. Marshall*, 50 W. Va. 229, 40 S. E. 342 (1901).

<sup>21</sup> See *Phillips v. Browne*, *supra* n. 16; noted in (1916) 16 COL. L. REV. 249. (The statute was held unconstitutional, however, as violating a provision against local or special legislation). What of the "guaranty" of speedy justice in all cases? W. VA. CONST., art. III, § 17.